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In the Matter of)
)
1983 Cable Royalty Fund))
Distribution Proceeding)

Docket No. CRT 84-1 83CD

ORDER

On May 29, 1985, the Program Suppliers filed their objections to the direct case evidence of the other claimant groups. One objection was to the testimony for the Devotional Claimants of Dr. David W. Clark, pp. 21-26 and to exhibits 12 and 13. The Program Suppliers objected that this testimony puts forward the time plus fee generated formula as the most reliable and most equitable means for the Tribunal to employ in making its allocation when such a formula had been rejected by the Tribunal in its final determination of the 1978 Cable Distribution Proceeding. The Devotional Claimants responded to the objection by arguing that the objection was untimely made and that it was not an evidentiary objection but rather a substantive argument about the proper standard for allocation.

On June 5, 1985, the Program Suppliers filed a Motion for Summary Dismissal on the Issue of a Time Plus Fee Generated Formula For Allocating Royalties. In their motion, the Program Suppliers stated that they were seeking summary disposition of a single limited issue: the use of a time plus fee generated methodology for allocating royalties.

In our Order of June 14, 1985, the Tribunal reserved ruling on the Program Suppliers' evidentiary objection until after it had considered later-filed pleadings on the issue. On June 19, 1985 at hearing, the Tribunal ordered all interested parties to file their comments concerning the Program Suppliers' motion by June 28, 1985. We received an opposition to the motion from the Devotional Claimants, comments from the Joint Sports Claimants, PBS, and the Canadian Claimants, and a reply to the Devotional Claimants' opposition from the Program Suppliers.

Argument

The Program Suppliers argue that use of a time plus fee generated methodology for distributing shares of royalties has been decisively and consistently rejected by the Tribunal; no new policy grounds have been offered by Dr. Clark to justify reconsidering established policy; and that the issue can and should be resolved at this time. They state that they do not seek to dismiss the component facts of either time or fee generation such as are contained in Devotional Exhibit 9 which ranks stations by the total fees generated, and the amounts of time for devotional programming. They seek to dismiss the formula as the means for allocation.

The Devotional Claimants reiterate their contention that the objection to Dr. Clark's testimony was not made during the period

provided by the Tribunal's Order published in the Federal Register of April 8, 1985 for informal resolution of evidentiary objections, and is therefore untimely. The Devotional Claimants further argue that the Program Suppliers have offered their own formula based upon fee generation, and that they cannot be allowed to close the door on the Tribunal's consideration of another, alternative approach for the allocation of royalties. The Devotional Claimants point out that at one time the Program Suppliers believed that time plus fee generation was "necessary to provide equity, fairness and consistency with the provisions of the Copyright Act."

The Joint Sports Claimants agree that the Tribunal has rejected the time plus fee generated formula as a basis for making royalty allocations and the rejection was entirely proper because it is in their view inconsistent with the intent underlying the Copyright Act. Therefore, the Joint Sports Claimants believe that it would be wasteful to devote hearing time to an already discredited formula. However, the Joint Sports Claimants note that the Tribunal may consider evidence related to time or to fee generation, because time has been traditionally accorded a secondary consideration, and fee generation, according to the Joint Sports Claimants, is directly related to marketplace value. The Joint Sports Claimants also note that other parties have reraised issues which the Tribunal has rejected in past proceedings; that they cannot see a distinction between other issues which have been reraised and this one; and

therefore, they interpose no objection to the Devotional Claimants presenting testimony on a time plus fee generated formula for whatever value the Tribunal may want to give it.

PBS agrees with the Program Suppliers that the time plus fee generated formula has been rejected in the past, and should not be the basis for allocating the 1983 fund, but opposes the exclusion of the formula at this juncture of the proceeding. PBS believes that this matter would be better resolved after hearing testimony and receiving post-hearing briefings by the parties.

The Canadian Claimants disagree that the Tribunal has rejected the time plus fee generated formula. They argue that the Tribunal has rejected it only as the sole criteria for allocating the royalty fund, and that the Tribunal left available its consideration of the formula as one of a variety of considerations and factors it may look to in allocating the fund. The Canadian Claimants believe that the Tribunal should take into account all pertinent data and considerations presented by the claimants.

The Program Suppliers reply that they do not object to fee generation analyses in general. Their sole objection is to one method of allocation - time plus fee generation. The Program Suppliers believe that neither the Tribunal nor the parties should be required to retill the same ground to find that the time plus fee generated method is barren of any substance for purposes of royalty distribution.

Discussion

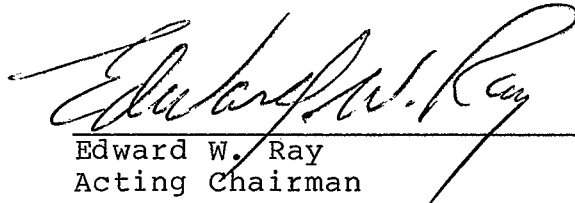
The Tribunal has overruled a number of evidentiary objections because they were untimely made. See, Order, dated June 14, 1985. However, in the interest of taking up the issues which shape this proceeding, we will address the objection lodged by the Program Suppliers.

We find that our view of the 1978 Cable Final Determination comes closest to the position advanced by the Canadian Claimants in their comments. In the 1978 proceeding we stated, "What is clear to us from this turmoil is that no single formula advocated by any party succeeds in taking account of all pertinent data and consideration . . . The Tribunal has made an allocation on the basis of the entire record of this proceeding. Our allocation has been fashioned by taking account of a variety of considerations and factors, as well as the use of combined results of a number of the approaches urged by the parties, adjusted as appropriate." 1978 Cable Royalty Distribution Determination, 45 Fed. Reg. 63035 (1980). Specifically, in regard to the Program Suppliers' proposed time plus fee generated formula, we stated, "We find serious weakness in the MPAA formulation. Both studies used factors for estimating the amount of non-network programming carried by network affiliate stations. The validity of these estimates was not sufficiently established in the opinion of the Tribunal. We thus rejected the MPAA

formulation as a complete (emphasis added) solution to the allocation problem." Id., at 63037. In a previous passage, we stated, "The time-related consideration factor, in comparison to all other factors used in arriving at the final allocation for each category of claimants was given very limited weight by the Tribunal. We find that despite the clear deficiencies and questionable data in all the time-related methods, each did offer some probative value to which we were able to accord some limited weight. The number of hours of cable carriage of particular kinds of qualifying programming was of some value to us. We found however that there were serious problems inherent in the use of any formulation which would allocate the royalty fees exclusively on the basis of hours of carriage in that such formulation fails to compensate copyright owners adequately for the use of their programming. We conclude that an allocation of royalties mainly based on the amount of time occupied by particular categories of programming would ignore market considerations and produce a distorted value of programming." Id., at 63036, 63037.

Taking these statements together, the Tribunal stated in 1980 that it based its decision on the entire record, that it found weaknesses in the time plus fee generated method and could not make it the basis of a complete solution, that it could accord some limited weight to time-related methods, but it heavily criticized any formulation which allocates exclusively

on the basis of time. We hold to our statement that no single formula advanced by the parties in the 1978 proceeding was adequate. Therefore, to the extent that the Program Suppliers seek summary dismissal of the time plus fee generated method as the sole basis for making allocations of royalties, we grant their motion. To the extent to which the Program Suppliers seek summary dismissal of the time plus fee generated method as one factor among others for making allocation of royalties, the motion is denied. Similarly, the evidentiary objection raised by the Program Suppliers is denied. The testimony will be accepted into the record as one factor among others to be considered by the Tribunal


Edward W. Ray
Acting Chairman

Dated: August 7, 1985